Supreme Court, U.S.
FILED

Case No. 04 1118 DEC 10 2004

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In The

Supreme Court of the United States

DAVID CRAIG KANZ,

Petitioner,

vs.

MATTHEW J. FRANK, and THE DEPARTMENT OF CORRECTIONS OF THE STATE OF WISCONSIN,

Respondents.

On Petition For a Writ of Certiorari
To the Seventh Circuit Court of Appeals

Verified Petition for Writ of Certiorari

David Craig Kanz
624 4th Avenue NE
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229.377.4128
In Want of counsel

Questions Presented

May state trial courts arraign, enter and impose a not guilty plea for an uncounseled individual, over the protest of the individual, bind over for trial, conduct a trial, obtain convictions, sentence and imprison the individual while wholly failing or refusing to appoint counsel to the individual, and without waiver or forfeiture of the right to counsel by the individual and over the constant ongoing protest for the need of counsel by the individual, as required by both the state Constitution of the State of Wisconsin and the Sixth Article of the Bill of Rights of the Constitution of the United States and in violation of the same, thus failing to "complete the court" as required by the 6th Article of the Bill of Rights and the ruling of this Court in *Johnson v. Zerbst,* (resulting in a loss of jurisdiction of the case), and in violation of the substantive, procedural and constitutional rights of the individual as demonstrated explicitly in the record in the instant case?

Does the failure or refusal of a state trial court to provide the assistance of counsel to a defendant, as demonstrated in the instant case, in violation of the Sixth Article of the Bill of Rights, render the state court judgment void *ab initio* and may the defendant in the instant case obtain release from imprisonment pursuant to such a judgment by means of habeas corpus as demonstrated explicitly in the record in the instant case?

May a state trial court, over the objection of an individual, try, obtain a conviction, enter judgment against him, arrest and incarcerate an individual after a state criminal felony prosecution has been removed to federal court and during the pendency thereof as demonstrated explicitly in the record in the instant case.

Parties to the Proceeding

The undersigned Petitioner, David Craig Kanz, in want of counsel throughout the entirety of the proceedings in the lower courts.

Respondents are Matthew J. Frank, current Secretary of the Department of Corrections of the State of Wisconsin and the Department of Corrections of the State of Wisconsin.

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Opinions Below

The Seventh Circuit Court of Appeals decisions in this case are attached in the Appendix as "A" and "B" denying a Certificate of Appealability and denying the Petitioner a Petition for Rehearing. The District Court's decision denying the undersigned Petitioner a Petition for Writ of Habeas Corpus without a hearing is attached in Appendix "C."

Jurisdiction

The judgment of the court of appeals was entered on August 17, 2004 denying the undersigned a Certificate of Appealability. A petition for rehearing, en banc reconsideration and stay of the mandate pending the filing of a petition for writ of certiorari to this Court was denied on September 13, 2004. A petition for writ of certiorari was filed by the undersigned on December 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under the All Writs Act.

Constitutional Provisions Involved

Article I section 7 of the Constitution of the State of Wisconsin provides:

"In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel..."

The Sixth Article of the Bill of Rights provides:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

The Fourteenth Amendment provides:

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process or law; nor deny any person within its jurisdiction the equal protection of the laws."

History of the Case

The undersigned filed a Constitutional (not a statutory) Petition for Writ of Habeas Corpus pursuant to the Constitution of the United States and the All Writs Act in the District Court for the Eastern District of Wisconsin. The district court then instructed the undersigned to amend his petition and file the statutory form for a statutory writ or face dismissal of the petition. The undersigned amended his petition while never waiving his right to the Constitutional Writ.

The district court without hearing and without requiring a response from the Respondent denied the Petition for Writ of Habeas Corpus. The undersigned requested reconsideration by the district court or in the alternative moved the district court for a certificate of appealability. The district court denied the request and motion.

The undersigned then petitioned the United States Court of Appeals for the Seventh Circuit for a Certificate of Appealability. The Seventh Circuit denied the petition in a one-sentence ruling stating there was no violation of the Constitutional rights of the undersigned. The undersigned moved the Seventh Circuit for reconsideration en banc or in the alternative a stay of the mandate pending the filing of a Petition for Writ of Certiorari to this Court. The Seventh Circuit again denied the motion for rehearing of the undersigned on September 13, 2004.

The undersigned remains in the custody of the Department of Corrections of the State of Wisconsin and is on probation. He currently resides at 624 4th Avenue NE, Cairo, Georgia.

This petition now comes before this honorable Court in a timely fashion.

Argument

I. Allegations of Petitioner Assumed To Be True By This Honorable Court

1. Since the Verified Petition for Writ of Habeas Corpus of the undersigned filed with the district court on August 1, 2003 was denied and dismissed on January 12, 2004 without requiring the respondent to answer and without a hearing, this honorable Court has stated that this honorable Court must assume that all of the petitioner's allegations contained in his Verified Petition for Writ of Habeas Corpus are true. (*Williams v. Kaiser*, 323 U.S. 471, at pages 473, 474, 65 S.Ct. 363, at page 365.[1])

2. That, as the record reveals and as contained in the verified allegations of the petitioner, the state trial court, over petitioner's protests and objection, arraigned the undersigned and entered a plea for the undersigned, over his objection, in response to the information filed against him, even though the undersigned petitioner was without the aid and advice of counsel, tried the undersigned without the aid and assistance of counsel, denying the undersigned the same, convicted the undersigned petitioner, sentenced and imprisoned the undersigned petitioner, and dismissed the state appeal of the petitioner for a purported procedural default, again denying him the assistance of counsel on his first appeal of right, which is his right. These actions constitute a denial of petitioner's constitutional right to

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[1] *House v. Mayo*, 324 U.S. 42: "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true."

a fair trial, with the aid and assistance of counsel which he was unable to obtain.[2]

3. The allegations contained in the record, which this honorable Court assumes as true pursuant to the ruling of this honorable Court in *Williams v. Kaiser*, supra, include without limitation, the following:

4. The state trial court failed or refused to provide and denied the undersigned petitioner the right to the assistance of counsel as preserved by the 6th Article of the Bill of Rights of the Constitution of the United States, which is his right, did not offer him the assistance of counsel at state expense nor did it appoint counsel to him as required; tried, convicted and imprisoned the undersigned, all done while denying the undersigned his right to the assistance of counsel, which is his right and failing to appoint counsel to the undersigned which is the state court's positive duty[3] so to do. The undersigned is in the custody of the Department of Corrections of the State of Wisconsin on probation and residing at the address contained herein.

5. That due to said denial, the state trial court and judge lost jurisdiction of the case[4] and yet proceeded to

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[2] (*Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 84 A.L.R. 527; *Ex parte Hawk*, 321 U.S. 114, 115, 116 S., 64 S.Ct. 448, 449.)

[3] *Carnley v. Cochran*, 369 U.S. 506 (1962); *Uveges v. Pennsylvania*, 335 U.S. 437, 441." 365 U.S., at 111, n. 1. See *Rice v. Olson*, supra, at 788; Gibbs v. Burke, supra, at 780..."; *Argersinger v. Hamlin*, 401 U.S. at 37, *Alabama v. Shelton*, 535 U.S. 654.

[4] *Johnson v. Zerbst*, 304 U.S. 458: "...**the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence** depriving him of his life or his liberty. **A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court---as the Sixth Amendment requires---by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this**

trial, convicted and imprisoned the undersigned without and devoid of jurisdiction and in violation of the rights of the petitioner as preserved by Article I section 7 of the Constitution of Wisconsin and the 6th, 5th and 14th Amendments of the Constitution of the United States.

6. That this Court has stated, to wit:

> "...The controlling rule is that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial." *Argersinger v. Hamlin,* 401 U.S. at 37." (*Alabama v. Shelton*, 535 U.S. 654.)

7. That the undersigned "...may not be imprisoned absent provision of counsel." (*Shelton*, supra)

8. That *Argersinger* v. *Hamlin*, 407 U.S. 25, and *Scott* v. *Illinois*, 440 U.S. 367 and *Alabama v. Shelton*, 535 U.S. 654, require provision of counsel in any petty offense, misdemeanor, or felony prosecution, *Argersinger*, 407 U.S., at 37, "that actually leads to imprisonment even for a brief period..." *id.*, at 33. (*Shelton*, supra)

9. That the rulings of this Court in *Johnson v. Zerbst,* 304 U.S. 458, *Argersinger* v. *Hamlin*, 407 U.S. 25, *Gideon v. Wainwright*, 372 U.S. 335, and *Scott* v.

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constitutional guaranty, and whose life and liberty is at stake. Cf. Frank v. Mangum, 237 U.S. 309, 327, 35 S.Ct. 582, 587, 59 L.Ed. 969. **If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by the court without jurisdiction is void, and the one imprisoned thereunder may obtain release by habeas corpus."**

Illinois, 440 U.S. 367, required provision of counsel to the undersigned by the State of Wisconsin in the felony prosecution brought against him in Case No. 95-CF-2110, State of Wisconsin v. David C. Kanz, (*Argersinger*, 407 U.S., at 37), as for any prosecution and conviction "that actually leads to imprisonment even for a brief period..." *id.*, at 33. (*Shelton*, supra)

10. That the state trial court failed or refused to provide to the undersigned the required counsel in Case No. 95-CF-2110, State of Wisconsin v. David C. Kanz, Dane County Circuit Court.

11. That the undersigned never waived or forfeited his right to the assistance of counsel as preserved by the Sixth Article of the Bill of Rights nor did he ever refuse counsel.

12. That, pursuant to the ruling of this honorable Court in *Zerbst*, the judgment of the state trial court is void *ab initio* due to the violation and denial of the right to the assistance of counsel of the undersigned, and the violation of the right to due process and equal protection of the law as guaranteed by the 14th Amendment, which are the rights of the undersigned, and said judgment is unenforceable.

13. That a void judgment "is no judgment at all."

14. That the purported judgment rendered against the undersigned in Case No. 95-CF-2110, State of Wisconsin v. David C. Kanz, Dane County Circuit Court is a void judgment and "is no judgment at all."

15. The Great Writ is an appropriate remedy in the federal courts in those exceptional cases where the conviction has been in disregard of the constitutional

rights of the accused, and where the writ is the only effective means of preserving his rights. (*Ex parte Hawk*, 321 U.S. at page 117, 64 S.Ct. at page 450.) The undersigned has no other legal recourse or means for redress available to him and the Great Writ is the only effective means of preserving his rights.

16. That there are no time limits, "rule making or legislating" which can be placed on or which effectively abrogates the right of the undersigned to claim the right of the Constitutional Petition for Writ of Habeas Corpus, to which the undersigned has a right, particularly if the statutory §2254 procedure proves to be "inadequate or ineffective." (*Miranda v. Arizona*, 384 U.S. 436; *U.S. v. Hayman*, 342 U.S. 205) That though this Court has determined that the §2254 habeas and the 1789/1867 habeas are "equivalent" to each other (*U.S. v. Hayman*, 342 U.S. 205) and that the statutory procedure "was not intended to impinge upon prisoners' rights of collateral attack upon their convictions; its sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum," (cf. *Hayman* at pp. 214-219), this Court also held in the same case that if the statutory procedure afforded prisoners a less adequate remedy than they would have under the 1789/1867 constitutional Petition for Writ of Habeas Corpus, the statutory procedure substituted for the habeas procedure by Congress would be unconstitutional and the constitutional Petition for Writ of Habeas Corpus should then be made available to the petitioner by the Court, to wit:

> "...In a case where the Section 2255 procedure is shown to be "inadequate or ineffective," the Section provides that the habeas corpus remedy

shall remain open to afford the necessary hearing..." (*U.S. v. Hayman*, 342 U.S. 205)

17. That, as the record reveals, the judgment of conviction in the state trial court was also entered against the undersigned during the pendency of a federal petition for removal filed with the United States District Court for the Western District of Wisconsin in violation of the Federal Rules and United States Code and therefore, in violation of the Constitution of the United States.[5]

18. The state court of appeals also denied the undersigned the assistance of counsel as preserved by the 6th Amendment, which is his right. Said denial is a violation of the 14th, 5th and 6th Amendments of the Constitution of the United States.

19. That all of the proceedings which occurred at the state trial and appellate levels, are nullities and are void due to the violation by the state courts of the 6th Article of the Bill of Rights and the violation of the right of the undersigned to the assistance of counsel as preserved by the 6th Article of the Bill of Rights made obligatory to the states by the 14th Amendment.

20. The State of Wisconsin has enforced and continues to enforce a void judgment and took the undersigned into custody and falsely imprisoned him without and devoid of lawful authority so to do in violation of the inalienable rights of the undersigned as preserved by the 5th and 6th Articles of the Bill of Rights and the14th Amendment of the Constitution of the United States.

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[5] State of Wisconsin v. David C. Kanz, Case #96-C-0856-S.

21. These, and all other allegations asserted by the undersigned, are assumed to be true by this honorable Court in its deliberations in this case pursuant to the ruling of this honorable Court in *House v. Mayo*, 324 U.S. 42, to wit:

> "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true. Williams v. Kaiser, 323 U.S. 471, at pages 473, 474, 65 S.Ct. 363, at page 365."

22. That the above allegations, which are true, satisfy the showing required by 28 U.S.C. §2253(c)(2) and (3). The undersigned has made a substantial showing of the denial of his Constitutional rights.

II. Wisconsin Requirements For the Provision of the Assistance of Counsel

23. That a criminal defendant has both a constitutional right to represent himself at trial as well as a constitutional right to be represented by counsel. Accordingly, it is the responsibility of the presiding trial judge to determine whether the defendant has knowingly, intelligently and voluntarily waived the right to the assistance of counsel and is competent to represent himself. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997).

24. In the instant case, Judge Daniel R. Moeser, Dane County Circuit Court, woefully failed and refused to uphold this obligation.

25. In *Klessig*, the Supreme Court of the State of Wisconsin expressly held that a waiver of counsel would

be valid only if the record reflected a deliberate choice to proceed without counsel and the understanding of the accused of the difficulties and disadvantages of self-representation, the seriousness of the charge and the general range of possible penalties. (211 Wis. 2d at 206).

26. The ruling of the court in *Klessig*, and its progenitors, further held that the trial court was required to engage the defendant in a colloquy to establish the knowing and voluntary waiver of the right to counsel. *Id.*

27. In *Klessig*, supra, the defendant even went as far as to inform the court and the public defender's office by letter he would be acting as his own counsel and asserting that he was prepared for trial on the scheduled day. The letter stated:

> "I would like to inform you that I will be acting on my own behalf in this case. I am prepared for the jury trial which is scedualed [sic] for December 12, 1994 in a number one position."

28. The law presumes that a waiver of counsel is invalid." (*State v. Klessig, supra*, 211 Wis. 2d at 204).

29. No circumstance in the instant case overcame that presumption.

30. That the state trial court, three days prior to trial, engaged the undersigned in a two minute interchange in which the undersigned informed the court that he was unable to obtain counsel. The state trial court, without further colloquy, construed the inability of the undersigned to obtain counsel as a waiver of the right to counsel without ascertaining whether or not the petitioner was indigent and failing or refusing to

appoint counsel to the undersigned for his trial. (Transcript attached in Appendix "D.")

31. That at sentencing in Case No. 95-CF-2110, on December 20, 1996, Luis Cuevas, the public defender provided to the undersigned due to a determination of indigency by the State of Wisconsin and for sentencing only, stated, on the record that, to wit:

> "Many people go to trial based upon their beliefs or convictions, with or without a lawyer. Sometimes I guess you have advice of that lawyer. **Mr. Kanz did not have the benefit to have an attorney represent him**. Any information that he gathered...was based upon his own reading of the law, his understanding of the law." (Index of Record to Court of Appeals of the State of Wisconsin, Document #110, p. 45, Exhibit 4 of the Verified Petition for Writ of Habeas Corpus, United States District Court for the Eastern District of Wisconsin, Case No. 03-0728.)

32. That if the undersigned was determined to be indigent at sentencing which occurred only two months after trial, he most certainly was indigent prior to the sentencing.

33. That the undersigned was ignorant of the definition of the term indigent at the time of these events, could not determine whether he was indigent and without the aid and advice of counsel could not make a knowing and intelligent waiver of the right to the assistance of counsel or whether to proceed to trial without the aid and assistance of counsel.

34. The undersigned never stated that he desired to proceed without Counsel, in fact, he protested to the contrary; Thus, even without regard to the defendant's affirmative and uncontradicted testimony throughout the entirety of the proceedings that he consistently wished to have the assistance of counsel and was unable to obtain his own lawyer, the record here shows that the purported waiver, construed by the state trial court as such, was impermissibly construed as a waiver, in violation of the defendant's state and federal constitutional right to counsel and due process.

35. That the Supreme Court of the State of Wisconsin stated in *Klessig*, supra, that, to wit:

> "The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law, and ultimately that justice is served. Gideon v. Wainwright, 372 U.S. 335, 344(1963). A criminal defendant in Wisconsin is guaranteed this fundamental right to the assistance of counsel for his defense by both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment.6 See Gideon, 372 U.S. at 339-43; Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936); Powell v.Alabama, 287 U.S. 45, 68 (1932); State v. Sanchez, 201 Wis. 2d219, 226, 548 N.W.2d 69 (1996); Spencer v. State, 85 Wis. 2d 565,570, 271 N.W.2d 25 (1978). The scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the

United States Constitution. Sanchez, 201 Wis. 2d at 229." (cites omitted)(emphasis added)

36. This being the case and law in Wisconsin, the trial court and court of appeals in Case No. 95-CF-2110 and appeal No. 98-1761 have failed to comply with the ruling of the Supreme Court of the State of Wisconsin even though said right to counsel, according to the Supreme Court of the State of Wisconsin, in "scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution. (Sanchez, 201 Wis. 2d at 229.)" (emphasis added)

37. That said right to counsel of the undersigned being "identical" under the Wisconsin Constitution as it is under the United States Constitution renders the burden and enforcement of said right by the courts of the State of Wisconsin identical to the burden and enforcement of the said right that is required of all federal courts.

38. That these actions and failure to act to appoint counsel to the undersigned by the trial court and the court of appeals were beyond the control of the undersigned and stand in blatant contradiction to and in violation of the Constitution of the United States and the 6th Article of the Bill of Rights as well as the Constitution of the State of Wisconsin Article I section 7.

39. That these actions, and a failure to act, by the state trial court rendered the proceedings in the trial court (and the appellate court) an absolute legal nullity that also deprived the state court of appeals of jurisdiction as the state court of appeals is not a court of original jurisdiction but draws its jurisdiction from the court

below. As there was no valid judgment in the trial court, there were, therefore, legally no valid proceedings that occurred after the loss of jurisdiction and in particular no procedural default by the undersigned at the appellate level. The proceedings at and the utterances of the court of appeals in this case are also void and an absolute nullity. The procedural requirements and time limits were not applicable due to the denial of counsel and the nature of the void judgment.

40. That absent and devoid of jurisdiction the state courts were devoid of ability to apply procedural requirements of any kind so as to deprive the undersigned of due process.

III. Federal Requirements For the Provision of the Assistance of Counsel

41. That the Supreme Court of the State of Wisconsin has stated in *Klessig*, supra, that, to wit:

> "...The scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution. Sanchez, 201 Wis. 2d at 229." (cites omitted)(emphasis added)

42. This being the case and law in Wisconsin, the trial court and court of appeals in Case No. 95-CF-2110 and appeal No. 98-1761 have failed to comply with the ruling of the Supreme Court of the State of Wisconsin even though said right to counsel is, according to the Supreme Court of the State of Wisconsin, in "scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin

Constitution and the United States Constitution. (Sanchez, 201 Wis. 2d at 229.)" (emphasis added)

43. That, in reliance on the ruling of this Court in *Carnley v. Cochran*, 369 U.S. 506 (1962), the state trial court (and later the court of appeals) had a positive, Constitutionally required administrative burden and duty to appoint counsel for the undersigned prior to the entry of a plea and most definitely prior to trial to assure compliance with the 14th and 6th Amendments of the Constitution of the United States and to "complete the court" and maintain jurisdiction of the case.[6]

44. That, as revealed in the record, the undersigned was denied his 6th Amendment rights to the assistance of counsel throughout the entirety of the proceedings in the State court, in violation of the utterances of this Court in *Alabama v. Shelton*, 535 U.S. 654 and *Argersinger* v. *Hamlin*, 407 U. S. 25, to wit:

> "The controlling rule is that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial." *Argersinger*, 407 U. S., at 37. Pp. 5-6." *Alabama v. Shelton*, 535 U.S. 654.

45. That further, this Court has stated where circumstances surrounding the trial take from it the essential elements necessary to constitute a hearing such as is demanded by due process, this Court has not hesitated to entertain a collateral attack. Thus in *Moore v. Dempsey,* 261 U. S. 86, where the pressure of a riotous mob turned the trial into a mere sham, and in *Mooney v. Holohan,* 294 U. S. 103, where the deception

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[6] *Johnson v. Zerbst*, 304 U.S. 458.

of court and jury by the intentional use of perjured testimony was held to make of the trial a mere pretense, this Court held that the accused could question the cause for his detention through habeas corpus proceedings. In neither of these cases did this Court decline to entertain the petition on the ground that by so doing the writ would be used as a substitute for a writ of error, although in both cases it is unquestioned that at the time of the original trial, the trial court had jurisdiction of the accused and of the subject matter. The trial court in both cases lost jurisdiction when the circumstances arose that turned the trial into a mere pretense.

46. So it was when Kanz was placed on trial without counsel and denied the same. The trial court no longer had jurisdiction to entertain a verdict or to pass judgment or sentence due to its failure to appoint counsel to the undersigned and the resultant violation of the 14th, 6th and 5th Amendment rights of the undersigned. Neither did the state court of appeals have jurisdiction in which to pass judgment or dismiss his appeal. Such actions were completely void. As was said in the case of *Hans Nielsen, Petitioner,* 131 U. S. 176,

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange,* where the Court had authority to hear and determine the case, but we held that it had no

authority to give the judgment it did. It was the same in the case of *Snow:*

> The Court had authority over the case, but we held that it had no authority to give judgment against the prisoner. "*He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment.*" (Italics supplied.)

47. Moreover, this Court has pointed out the similarity between the denial of due process through mob domination and such denial by failure to appoint counsel:

> **a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob" (287 U. S., at p. 59).

48. The complete answer, however, to the contention made by the Seventh Circuit Court of Appeals, but which the state courts and the State of Wisconsin have not yet made here, to-wit, that even if Kanz has been deprived of his constitutional rights, he cannot obtain his freedom by habeas corpus, is that if he cannot obtain it in that manner, then he is absolutely helpless, barred from redress and limited to a habeas procedure to which he will be barred and imprisoned pursuant to a

void judgment, forever to remain a "convicted felon," for without counsel he could not have determined if he wished to proceed without counsel in the prosecution brought against him, he could not preserve the necessary record for appeal and he could not prepare his appeal after trial under the appropriate rules of court nor have knowledge or the capability to comply with appellate procedure and federal habeas procedure. It seems clear that a right as vital as those guaranteed by the Fifth and Sixth Articles of the Bill of Rights, and made obligatory to the State of Wisconsin by the 14th Amendment, cannot be so lightly brushed aside as the state courts, the district court and the Seventh Circuit Court of Appeals have apparently done.

49. That the failure to maintain jurisdiction on the part of the state trial court, thus completely losing jurisdiction, invalidates and renders a legal nullity every event, action, decision and order issued by the courts, (trial and appellate), that transpired in the state trial court and state court of appeals from the arraignment of the undersigned forward including, but not limited to, the state appeal process.

50. That, as the record reveals, the undersigned petitioner protested three days prior to trial that he could not nor was he able to go to trial without the assistance of counsel. The state trial court failed or refused to appoint counsel to the undersigned and construed the inability of the undersigned to obtain the assistance of counsel as a waiver of the right to the assistance of counsel. The state trial court woefully failed to meet the state requirements and obligations as expounded on in *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997) and it woefully failed to meet the requirements and obligations of the 6th Article of the Bill of Rights of the Constitution and the requirements

and obligations contained in the rulings of the Supreme Court of the United States in *Argersinger v. Hamlin,* 401 U.S. at 37, *Gideon v. Wainwright*, 372 U.S. 335, or *Alabama v. Shelton*, 535 U.S. 654. The undersigned was never offered nor did he decline appointed counsel, which is mandated by the 14th Amendment. Further, a request for appointed counsel was not necessary, (though said request was invoked on every pleading of the undersigned signed "in want of counsel"), to invoke the 6th Amendment mandate to the effective assistance of counsel, which is the right of the undersigned petitioner and was not necessary in order for the state trial court to appoint said counsel. (*Carnley v. Cochran*, 369 U.S. 506)[7]

51. That the *Shelton* case is almost identical to the *Klessig* case in this respect: each defendant appears to have stated on the record that they wished to proceed to trial without the assistance of counsel.

52. Yet in each case it was determined that there was no waiver or forfeiture of the right to counsel and this honorable Court determined that the defendants in those cases were denied the same.

53. If this is the case in the controlling case law uttered by this honorable Court in *Shelton*, what must be the determination in a case where a defendant protests on the record that he is unable to proceed to trial without

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[7] If the petitioners in *Argersinger* and *Shelton* were denied the right to the assistance of counsel, and they were, the undersigned most assuredly was denied this right. Both *Argersinger* and especially *Shelton* provide, in the opinion of the undersigned, debatable circumstances regarding the denial of the right to the assistance of counsel. The case of the undersigned, as the record reveals, is an undebateable circumstance of the denial of the right to the assistance of counsel as he never waived or forfeited said right and was forced to trial without counsel by the state trial court.

the assistance of counsel and is not even aware of the definition of the term indigent, as the record reveals, in the instant case?

54. In acting thus, the state trial court lost jurisdiction of the case from at least the point of trial forward if not from the initial appearance of the undersigned forward. (*Wainwright v. Sykes*, 433 U.S. 72; *Johnson v. Zerbst*, 304 U.S. 458)

55. That pursuant to the ruling of this Court in *Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 U.S. 238, there is no time limit for redress against a void judgment which was obtained by a fraud upon the court.

56. That, upon information and belief, a judgment obtained by a state court in violation of the 6th Article of the Bill of Rights of the Constitution of the United States and in violation of Due Process, is fraudulently begotten and is a fraud upon the court.

57. That the judgment of the state court in the instant case was fraudulently obtained, is a fraud upon the court and is void and therefore unenforceable to any extent or degree.

58. The undersigned is restrained in and deprived of his liberty and unlawfully in the custody of the State of Wisconsin in violation of the Constitution of the United States, the 6th and 5th Articles of the Bill of Rights and 14th Amendment guaranteeing him that he cannot be denied the right to counsel and Due Process.

IV. Reasons for Granting the Petition

59. Should this honorable Court conclude that it is constitutionally permissible to arraign, try, convict and impose a prison sentence on an uncounseled defendant who never waived, forfeited or rejected the assistance of counsel and send the defendant to prison, it will have ripped the soul out of *Johnson v. Zerbst*, 304 U.S. 458, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1971), and *Alabama v. Shelton*, 535 U.S. 654 and invited the States to continue to circumvent the right to counsel by sending defendants to prison without ever subjecting the issue of guilt to serious adversary testing.

V. Conclusion

60. The undersigned petitioner never waived or forfeited his right to the assistance of counsel as preserved by the Sixth Article of the Bill of Rights and the Constitution of the State of Wisconsin. He protested, both orally and in writing in his pleadings, that he was not able to proceed without such assistance. The state trial court had a positive duty to appoint counsel to the undersigned, as he was unable to obtain the assistance of counsel. The failure or refusal by the state trial court to do so deprived the state court of jurisdiction and rendered the judgment obtained void *ab initio*. The undersigned has been imprisoned and held in custody for over eight years pursuant to a void judgment. The record reveals a heinous deprivation and violation of one of the most basic rights preserved by our Constitution. The judgment of the state trial court must be vacated as void *ab initio* and the petitioner released from custody.

61. That all of the statements made by the undersigned in this Verified Petition for Writ of Certiorari are made under the pain and penalty of perjury, are made of my own certain knowledge and are true, except those statements made upon information and belief which the undersigned verily believes to be true.

VI. Request for Relief

Wherefore, on the foregoing basis, the undersigned requests that this Court grant his verified petition for writ of certiorari, vacate the state court judgment as void and order the immediate release of the undersigned petitioner from custody.

Dated: December 10, 2004

Respectfully submitted,

David Craig Kanz

David Craig Kanz, in want of counsel
624 4th Avenue NE
Cairo, GA 39828
229.377.4128

The above signed David Craig Kanz, being personally known to me, did appear before me and did then and there affix his signature to the attached Verified Petition for Writ of Certiorari.

Carol B. Oberlin Notary for the State of FL.

My commission expires on 20

CAROL B. OBERLIN
MY COMMISSION # DD 101412
EXPIRES: March 26, 2006
Bonded Thru Notary Public Underwriters

Personally Known ☐ Produced Identification ☐

Type of I.D. Produced GADL # 051776450

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APPENDIX

Appendix "A"

United States Court of Appeals
For the Seventh Circuit
Submitted August 6, 2004
Decided August 17, 2004

Before
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
No. 04-1319

David C. Kanz,
Petitioner-Appellant,

v.

Matthew Frank,
Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 03 C 728
J. P. Stadtmueller, *Judge*.

Order

David C. Kanz has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

Appendix "B"

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 13, 2004

Before

Hon. William J. Bauer, Circuit Judge

Hon. Frank H. Easterbrook, Cicuit Judge

David C. Kanz,
Petitioner-Appellant,

No. 04-1319 v.

Matthew Frank,
Respondent-Appellee.

Order

Petitioner-Appellant filed a petition for rehearing and rehearing en banc or in the alternative motion for stay of mandate on August 31, 2004. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing and motion to stay mandate are therefore DENIED.

Appendix "C"

United States District Court
Eastern District of Wisconsin

David C. Kanz — Judgment in a Civil Case

v. — Case Number: 03-C-728

Jon E. Litscher,
Wisconsin Department of Corrections

Decision by Court. This action came on for consideration before the Court and a Decision has been renedered.

IT IS ORDERED AND ADJUDGED THAT THE PETITION BE AND THE SAME IS HEREBY DENIED;

IT IS FURTHER ORDERED AND ADJUDGED THAT THIS ACTION BE AND THE SAME IS HEREBY DISMISSED; AND

IT IS FURTHER ORDERED THAT THE PETITIONER'S MOTION FOR IMMEDIATE RELEASE BE AND THE SAME HEREBY DENIED AS MOOT.

APPROVED:
January 12, 2004

/s/ J. P. Stadtmueller
U.S. District Judge

/s/ Sofron B. Nidilsky
Clerk

/s/ Patricia K. Blackburn
(By) Deputy Clerk

Appendix "D"

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 11

STATE OF WISCONSIN,

PLAINTIFF,

VS. Case No 95-CF-2110

DAVID C. KANZ,

DEFENDANT.

DATE: OCTOBER 10, 1996

PROCEEDINGS: MOTION HEARING

BEFORE: THE HONORABLE DANIEL MOESER

APPEARANCES:

C. WILLIAM FOUST, Dane County District Attorney, appearing on behalf of the State;

DEFENDANT DAVID C. KANZ, appearing in person and on behalf of himself.

Geri Elveru, RMR
Court Reporter

PP. 51-54 of the Transcript STARTING AT LINE 15 OF P. 55.

THE COURT: There's one thing I want to take up before we take our break, and that's the issue of counsel. Mr. Kanz, it's hard to tell, because you sign a lot of things "in want of counsel" or words to that effect, what is your position with respect to having an attorney.
THE DEFENDANT: I have sought counsel.

THE COURT: Where have you gone, sir?

THE DEFENDANT: Georgia, talked to people in Ohio and Wisconsin. "In want of counsel" states that I am not appearing pro se, which I object. This case has been stylized as me appearing pro se which would indicate in my mind I'm competent to prosecute or defend. That is not what I am saying.

THE COURT: Do you believe you are not competent?

THE DEFENDANT: I believe I am in want of counsel.

THE COURT: Do you believe you are not competent?

THE DEFENDANT: Seeking benefit of counsel.

THE COURT: Can you answer my question?

THE DEFENDANT: I've already answered.

THE COURT: If you think that's your answer, that can stand. What attorneys in Wisconsin have you contacted?

THE DEFENDANT: That's irrelevant. It doesn't matter.

THE COURT: Do you believe you are indigent?

THE DFENDANT: No, I do not.

THE COURT: What is your position?

THE DEFENDANT: It means I am still continually seeking counsel.

THE COURT: Do you have appointments set?

THE DEFENDANT: I haven't any set up as of today.

THE COURT: As I understand it, I want the record to be clear, you don't claim you are indigent, and you refuse to tell me the names and dates and times, places where you contacted Wisconsin counsel?

THE DFENDANT: What would that matter?

THE COURT: It would appear---it would help us determine whether or not you have made reasonable effort to obtain counsel. And you've checked apparently with counsel in a couple other states?

THE DEFENDANT: Uh-huh.

THE COURT: And is it your intention to proceed without counsel next week for trial?

THE DEFENDANT: No.

THE COURT: What is your intention?

THE DEFENDANT: My intention is to continue to seek benefit of counsel.

THE COURT: But you refuse to put on the record what you have done or what you are going to do to accomplish that?

THE DEFENDANT: As I stated ---

THE COURT: Beyond what you have already said.

THE DEFENDANT: I am innocent, sir, of any wrongdoing. So to characterize me as someone who isn't doing what I say I object to.

THE COURT: Is it your position the case should or should not go ahead next week?

THE DEFENDANT: I don't think it should go on.

THE COURT: For what reasons?

THE DEFENDANT: You're asking the questions.

THE COURT: Well, if you have a basis for thinking it shouldn't go ahead, I would like to have it on the record.

THE DEFENDANT: Without benefit of counsel.

THE COURT: So you think a defendant in a criminal case who never obtains counsel has a right to have a case adjourned indefinitely?

THE DEFENDANT: I didn't say that.

THE COURT: What are you saying?

THE DEFENDANT: I said what I said.

THE COURT: Okay. The record will speak for itself. Just so there is no misunderstanding, I believe the record will show that you have been advised of your right to counsel

on numerous occasions, and that your total conduct in this case does constitute a waiver of counsel.
THE DEFENDANT: On what basis?

THE COURT: I believe the record will demonstrate that you have had every opportunity to get counsel. Okay. You want to file something more?

(So ended the only interchange that ever occurred between the court and the undersigned throughout the entirety of the prosecution brought against the undersigned regarding the right to the assistance of counsel of the undersigned.)

(2)

Supreme Court, U.S.
FILED

Case No.: 04 1118 DEC 10 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID CRAIG KANZ,

Petitioner,

vs.

MATTHEW J. FRANK, and THE DEPARTMENT OF CORRECTIONS OF THE STATE OF WISCONSIN,

Respondents.

On Petition For a Writ of Certiorari
To the Seventh Circuit Court of Appeals

Supplement to Appendix "C" Of the Verified Petition for Writ of Certiorari

---

David Craig Kanz
624 4th Avenue NE
Cairo, Georgia 39828
229.377.4128
In want of counsel

Supplement to Appendix "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID C. KANZ

Petitioner,

v. Case No. 03-C-0728

JON E. LITSCHER, WISCONSIN DEPARTMENT OF CORRECTIONS,

Respondents.

ORDER

Pro se David C. Kanz, ("Kanz") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. For the reasons stated below, the court must deny the petition.

BACKGROUND

On October 16, 1996, Kanz was convicted of forgery, in violation of Wis. Stat. § 943.38(2) and criminal slander of title, in violation of Wis. Stat. § 943.60(1). (See Amended Petition, Exhibit 1.) Kanz was sentenced to two years of probation concurrent to the prison term for the forgery count.

On December 9, 1998, the Wisconsin Court of Appeals dismissed Kanz's appeal from his conviction because Kanz failed to file his brief on numerous occasions. The full order reads:

> The appellant takes this appeal from a felony conviction. His brief was originally due on September 3, 1998. The briefing schedule was then tolled pending a decision on the appellant's motion for summary reversal. On September 21, 1998, he requested more time to file his brief and, on September 25, 1998, we extended his deadline until November 18, 1998.
>
> On November 16, 1998, the appellant requested yet another extension. He stated that he was too busy looking for work to complete his brief. By Order dated November 19, 1998, we denied his request for additional time. His November 16, 1998 motion did not state good cause and failed to explain how he could file lengthy motions in this court and federal court while maintaining that he could not file a brief. He was given a final briefing deadline of November 25, 1998. Although two weeks have passed from that final deadline, the appellant remains delinquent.

(State of Wisconsin v. Kanz, 98-1761-CR, December 9, 1998 decision, at 1-2.)

On February 25, 1999, the Wisconsin Supreme Court denied Kanz's petition for review.

Kanz filed his federal habeas petition on August 1, 2003.[1] The basis of Kanz's federal habeas petition is that Kanz was denied counsel at his trial. (See Amended Petition, ¶ 22.) The trial court determined that Kanz had been advised of his right to counsel and that his conduct constituted a waiver of counsel. (See Amended Petition, Exhibit 2, at 54.)

Noting that the one-year statute of limitation had expired many years before Kanz filed his petition, this court ordered Kanz to demonstrate why his petition should not be dismissed as untimely. (See August 15, 2003 order, at 2.) This court also ordered Kanz to demonstrate why his petition should not be dismissed on the basis of procedural default. (See October 22, 2003 order, at 1-3.) Kanz has filed a brief purporting to show cause why his petition should not be dismissed.

DISCUSSION

The court must dismiss Kanz's petition because it is untimely. The Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"] enacted a one-year limitation period for filing a petition for habeas corpus. 28 U.S.C. § 2254(d). The limitation period applies to all habeas petitions filed after April 23, 1997, one year following the effective date of the amendment. *Lindh v. Murphy*, 96 F3d. 856, 866 (7th Cir. 1996) (en banc), *rev'd*

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[1] Although Kanz states that he has not previously filed any petitions, applications, or motions with respect to the judgment in any state or federal court, (see Amended Petition, ¶14), Kanz's petition is inaccurate. Kanz attaches an April 24, 2003 order in Kanz v. State of Wisconsin, 03-C-0192 (E.D. Wis. April 24, 2003) in which the Honorable Thomas J. Curran dismissed Kanz's petition without prejudice because Kanz failed to file his petition with the court approved form. Because the dismissal was without prejudice, Kanz's petition in this action is not a second or successive habeas petition. See U.S.C. §2254(b).

on other grounds, 521 U.S. 320 (1997). Those whose convictions predated AEDPA were given a year after its enactment on April 24, 1996-i.e. until April 23, 1997-within which to file their habeas petitions. See id.; see also *Gendron v. United States*, 154 F3d. 672, 675 (7th Cir. 1998).

The one-year filing period began running in May 1999, ninety days after the Wisconsin Supreme Court denied the petition for review on February25, 1999. See *Anderson v. Litscher*, 281 F.3d 672, 674-75 (7th Cir. 2002) (noting that the period begins to run on the expiration of the time to petition the United State Supreme Court for certiorari). Kanz's time for filing a federal habeas petition, therefore, expired in May 2000. Kanz is more than three years late in filing his petition.

Kanz argues that the court should equitably toll the limitations period because he was denied trial and appellate counsel in state court and because he "could not, despite the exercise of reasonable diligence, have discovered all the information needed in order to be able to file his claim on time." (See Petitioner's October 31, 2003 brief, at 26.) (citing *Johnson v. McCaughtry*, 265 F.3d 559, 565 (7th Cir. 2001). Kanz argues: "That because of the denial of counsel, to which the undersigned has a right, we will never know if counsel would have complied with the procedural requirements of the AEDPA." (Petitioner's October 31, 2003 brief, at 29.)

Kanz's lack of counsel in state court provided no basis for his failure to file a federal habeas petition in a timely manner. There is no constitutional right to counsel in a federal habeas corpus proceeding. See *Piggie v. Cotton*, 343 F.3d 660 (7th Cir. 2003). Therefore, even if Kanz were assigned counsel in state court, Kanz would

not have been entitled to any assistance from counsel in filing his federal habeas petition in a timely manner.

Kanz's argument that he lacked information to be able to file his petition on time similarly missed the mark. Equitable tolling "excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information needed in order to file his claim on time." *Taliani v. Chrans*, 189 F.3d 597, 597 (7th Cir. 1999). The doctrine is applied sparingly and only when "extraordinary circumstances" far beyond the prisoner's control prevented timely filing. *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even in diligence.").

Kanz never describes the information that he needed to file his claim on time. Te basis of Kanz's petition is denial of trial counsel. The only information that Kanz needed to file his habeas petition was the information that he was denied counsel at trial, information which Kanz undoubtedly possessed. Moreover, Kanz's lack of legal knowledge or any alleged deficiencies in the prison law library are not the type of "extraordinary circumstances" that would justify equitable tolling. *Johnson*, 265 F.3d at 566 (finding that the "circumstances of incarceration" do not warrant equitable tolling); *Owen v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000) ("Owens is young, has limited education, and knows little about the law. If these considerations delay the period of limitation until the prisoner has spent a few years in the institution's law library, however, then §2244(d)(1) might as well not exist; few prisoners are lawyers.") As a district court in this circuit has recently

states, "habeas relief, by definition, is almost always sought by an incarcerated petitioner,' and proceeding pro se with limited legal skills and limited access to legal materials in not an exceptional circumstance for a habeas petitioner." *Gilyana v. Sternes*, 2001 WL 1654722, at *5 (N.D. Ill. Dec. 20, 2001), *quoting Johnson*, 265 F.3d at 566.

Because the court finds that Kanz's habeas petition is untimely, the court need not consider whether Kanz's petition should be also be dismissed on the basis of procedural default.

Accordingly,

IT IS ORDERED that the petition be and the same is hereby DENIED;

IT IS FURTHER ORDERED that this action be and the same is hereby DISMISSED; and

IT IS FURTHER ORDERED that the petitioner's motion for immediate release be and the same is hereby DENIED as moot.

The clerk is directed to enter judgment accordingly.

Dated in Milwaukee, Wisconsin this 12th day of January, 2004.

BY THE COURT

/s/ J. P. Stadtmueller
U.S. District Judge